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Supreme Court of the United States

October Term, 1938

No. 65

DOUGLAS FAIRBANKS,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

MOTION AND BRIEF OF CARROLL N. PERKINS AND LEONARD A. PIERCE AS AMICI CURIAE FOR AND ON BEHALF OF FRANCES M. AVERILL.

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DOUGLAS FAIRBANKS,
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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May It Please The Court:

The undersigned as counsel for Frances M. Averill, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

CARROLL N. PERKINS,
LEONARD A. PIERCE,
Counsel for Frances M. Averill,
Amici Curiae.

Supreme Court of the United States

October Term, 1938

No. 65

DOUGLAS FAIRBANKS,
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UNITED STATES OF AMERICA,
Respondent.

On Certiorari To The Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF AMICI CURIAE.

This brief, by permission of the Court and with the consent of counsel for the respective parties, is filed by the undersigned as *amici curiae*, and on behalf of Frances M. Averill of Waterville, Maine, the Petitioner in *Averill* v. *Commissioner*, decided by the Circuit Court of Appeals for the First Circuit on December 28, 1938, by reason of which decision this Court granted *certiorari* in the case at bar.

We also represent her husband, George G. Averill, the Petitioner in other cases pending before the Circuit Court of Appeals for the First Circuit, in all of which the question here presented is involved.

FACTS.

The facts in the case in suit are set out in the transcript of record and in the opinion of the Circuit Court of Appeals for the Ninth Circuit, as well as in the brief of the Petitioner.

A BRIEF RESUME OF THE FACTS IN THE CASE REPRESENTED BY THE UNDERSIGNED DECIDED BY THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Frances M. Averill, a resident of Waterville, Maine, had owned for more than two years $85,000. principal amount of the mortgage bonds of Keyes Fibre Company, Inc. when on September 1, 1931 they matured and were paid in accordance with the terms of the indenture under which they were issued.

Omitting other contentions not involved in the case at bar, as to which the Circuit Court of Appeals for the First Circuit ruled in favor of the taxpayer, the taxpayer contended and that Court found, in direct opposition to the decision of the Circuit Court of Appeals for the Ninth Circuit, that the taxpayer was entitled to the benefit of the Capital Gains Section, so called, and thus the profit received on the payment of her bonds at maturity was taxable at the maximum rate of 12½%. The only factual differences between the cases are: in that at bar the gains were received in the years 1927, 1928 and 1929, in our case they were received in the year 1931. In the case at bar the bonds were called for payment prior to maturity. In our case they were paid at the maturity named in the bonds.

One of the questions decided by the Circuit Court of Appeals for the First Circuit in our case, *Averill* v. *Commissioner*, C. C. A. (First Circuit, October Term, 1938, #3376) is the very question presented to this Court in the instant case, although the decision in the *Averill* case was also based upon other grounds, likewise equally conclusive. The amount involved in the case decided by the First Circuit, together with the three other pending cases in which our clients are interested, involving the payment of other maturities of the same issue in 1932 and 1933, is somewhat in excess of $100,000. For these reasons our clients have a very real interest in the decision of this case.

THE ISSUE.

The issue presented in the case in suit, while narrow, is nevertheless important: Do the words "sale or exchange" in Section 208 (a) (1)[1] of the Revenue Act of 1926 and the identical words in Section 101 (c) (1) of the Revenue Act of 1928 include the payment of bonds by the issuing corporation?

I.

WHETHER OR NOT THE LITERAL WORDING OF THE SECTION WOULD ORDINARILY INCLUDE PAYMENT, EITHER AT MATURITY OR ON CALL, SUCH PAYMENT IS CLEARLY WITHIN THE CONGRESSIONAL INTENT.

It is axiomatic that the ultimate goal to be sought in the expounding of statutes, either state or federal, is the intention of the legislative body enacting them. The literal meaning of the words used is of course important, but even such literal meaning must be subservient to the legislative intent when such intent can be clearly ascertained.

[1] "(1) The term 'capital gain' means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;"

Instances in which courts of high standing have felt justified in going beyond the literal wording of a statute in order to determine the legislative intent could be multiplied indefinitely,[2] particularly when, as here, the literal meaning leads to an obviously unfair result. In *Lionberger* v. *Rouse*, 9 Wallace 468, this Court said at page 475:

> "* * * * * It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and this is especially true where the precise words, if construed in their ordinary sense, *would lead to manifest injustice.*" (Emphasis supplied.)

One becomes impressed with the antiquity of this principle from the quaint language in the case of *Stradling* v. *Morgan*, Plowden 205a, as quoted with approval in *Cox* v. *Hakes*, 15 App. Cas. 506, at p. 518 (1890):

> "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. *So that they have ever been guided by the intent of the Legislature.*

[2] In *Hawaii* v. *Mankichi*, 190 U. S. 197 (1903), the Court stated at page 212: "* * * * * the books are full of authorities to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute. * * * * *"

which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion." (Emphasis supplied.)

We know of no clearer judicial exposition of this principle than that stated by this Court in *Helvering* v. *New York Trust Co.*, 292 U. S. 455 (1934), wherein the Court said (p. 464):

> "But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished.
>
> . . . . . .
>
> Quite recently in *Ozawa* v. *United States*, 260 U. S. 178, 67 L. Ed. 199, 43 S. Ct. 65, we said (p. 194): 'It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.'"

Applying to the legislation involved in the case at bar every test thus prescribed by this Court, we find that the result of each such test is consistent only with the taxpayer's position and entirely inconsistent with that of the Department.

Thus, granting for the purposes of argument that the literal meaning of the words would exclude payment, as the Government contends, we find that such construction

would (1) "lead to an unreasonable result", and (2) be "plainly at variance with the policy of the legislation as a whole".

(A) The construction urged by the Government leads "to an unreasonable result".

Instances of the unreasonable result to which the construction urged by the Government would lead are numerous. If a taxpayer sells one-half his bonds only one day prior to the date of payment but retains the other half and presents them in normal course on the due date, he would be taxable at a much higher rate for those he held a day longer and at a much lower rate for those sold the day before.[3] If taxpayer A, owning certain bonds of an issue, presents them at maturity for payment he is taxable at a higher rate, while taxpayer B, who has happened to sell his bonds prior to maturity at par, is taxable at a lower rate. If a taxpayer sells his bonds to the issuing corporation a few days before maturity he is taxed at the lower rate, if he presents them at maturity, at the higher rate. If a corporation elects to call its bonds and the taxpayer awaits the due date fixed by the call he is taxable at the higher rate, while if the corporation, instead of calling had followed the not unusual course of purchasing its own bonds on the open market from their holders, the tax would be at the lower rate. If the securities called for payment are preferred stock the tax is at the lower rate.[4] If, on the other hand, bonds are called the tax is at the higher rate.

Turning then to *Ozawa* v. *U. S.*, 260 U. S. 455, quoted supra, if the "natural significance" of the language of the Act be in accord with the Government's contention, no one could fairly

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[3] *McKee et als.* v. *Commissioner*, Dec. No. 9547 (C. C. H. 1937).

[4] *Mary S. Childs* v. *Commissioner*, Dec. No. 9653 (C. C. H. 1937).
Robert I. Meyer, 27 B. T. A. 44 (Dec. No. 7810).
Louis Rorimer, 27 B. T. A. 871 (Dec. No. 7953).

claim that such "natural significance" did not "lead to an unreasonable result". In fact, the result is not only unreasonable; it lacks any semblance of fairness.

(B) Applying the second test stated in the Ozawa case, the result of the Government's contention is "plainly at variance with the policy of the legislation as a whole".

That policy has been clearly and authoritatively stated by this Court in *Burnet* v. *Harmel*, 287 U. S. 103, at 106, when in construing the 1924 Act (identical in phraseology with the 1926 and 1928 Acts) the Court said:

> "* * * * * The provisions of the 1921 Revenue Act for taxing capital gains at a lower rate, re-enacted in 1924 without material change, were adopted to relieve the taxpayer from these excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions."

We submit that the Circuit Court of Appeals for the Ninth Circuit, in its opinion in the pending case, for no apparent reason disregarded the first of the two purposes which this Court in the above quoted paragraph plainly found were intended by the Act in question.

Not only does the Government disregard the first of the reasons stated by this Court for the enactment of the Capital Gains Section, but it also ignores the limitation contained in the Section itself. Were Congress interested only in the gain to the revenue, there would be no good reason for the provision in the section that only gains on assets held for more than two years come within the Section. The revenue would be still further increased if the limitation to assets held more

than two years were omitted. The inclusion of such limitation proves this Court correct in saying that Congress intended not only to increase the revenue but "to relieve the taxpayer from these excessive tax burdens". We submit the Ninth Circuit erred in finding the contrary.

It would therefore seem clear that in construing the Capital Gains Section and giving it *"effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail"*, the taxpayer in the case at bar is entitled to treat the payment of his bonds when called by the issuing corporation as a "sale or exchange" of a capital asset.

II.

AN AMBIGUITY EXISTS IN THE WORDING OF THE SECTION, TO RESOLVE WHICH TWO WELL RECOGNIZED CANONS OF STATUTORY CONSTRUCTION SHOULD BE APPLIED.

In answer to the Government's argument that "sale or exchange" are unambiguous terms, do not include payment and therefore there is no room for construction, the Circuit Court of Appeals for the First Circuit *(Averill v. Commissioner, supra)* pointed out that it is not true "that in the very nature of things a covenantee cannot sell a bond or other specialty to the covenantor". The holder can sell a bond to anybody. The incidents of such sales may vary and the purchaser, if a stranger, not only gets title to the bond but the right to enforce it. The covenantor, however, having acquired the bond at maturity or on call, gets title to the bond exactly as would the stranger, even though he acquires no right to enforce it. A bond, a piece of paper, as distinguished from the rights which accrue to the holder, can be the subject of

larceny in every state in the Union.[5] In states which retain the common law procedure, the action of trover, which in its essence is based upon the right to possession of tangible personalty, can unquestionably be maintained for the conversion of a bond or a note.[6] The measure of damages may vary, it is true, under the circumstances of the particular case, but the fact is unquestioned that the physical document has all the characteristics of tangible personalty, separate and distinct from those of a chose in action.

This being so, there can be no good reason why the surrender of the bond to the issuing corporation on payment therefor should not be deemed an exchange of the bond itself. Immediately prior to the surrender the bondholder had title not only to the chose in action but title also to the document. After the surrender the covenantor had title to the document and the bondholder title to the money. Accurately and literally, there was an "exchange" of bond for money and the transaction did not lose the character of an "exchange" because it was also the payment of a chose in action. We appreciate that title to the piece of paper and the incidents of such title are usually not so important as title to the chose in action and its incidents. On the other hand, the Government insists on an interpretation of the statute which no one pretends to say is fair or that Congress would have intended, if it had chanced to consider the effect of the language used, when a capital asset was paid in due course. The language of Judge Hand in *Freedman Bros.* v. *Greaney*, 297 Fed. 478, 479, is an appropriate answer to the Government's position: "If the defendant would chop logic, I may insist that he chop through to the end. * * * The defendant must take the bitter with the sweet."

The drafting of a general statute, to cover a multiplicity of transactions later to transpire, is always fraught with danger

[5] 36 C. J. 743, Sec. 27.
[6] *Chew* v. *Louchheim*, 80 Fed. 500 (1897), (C. C. A. 3d).
Kimball v. *Billings*, 55 Me. 147 (1867).

that the general language used at the time may not exactly fit into a perfectly normal future transaction, to which the attention of the draftsman was not at the time specifically called. As this Court said in *Helvering* v. *New York Trust Company, supra,* (at p. 465):

> "Construed strictly according to the letter, the provision would not include shares received as a dividend less than two years before the sale or property taken in exchange within that period. The need of this regulation illustrates how ambiguities requiring construction often exist where upon first reading the words seem clear. Generally, questions as to the meaning intended do not arise until the language used is compared with the facts or transactions in respect of which the intent and purpose are to be ascertained."

* * * * * *

The meaning of the statute, then, as the Circuit Court of Appeals for the First Circuit said in the *Averill* case, being "debatable", we turn to recognized canons of construction to aid in its interpretation.

A. *Congress, by re-enacting the Capital Gains Section without change, subsequent to the decision in the Werner case and to the administrative ruling acquiescing in that decision, adopted the interpretation therein set forth, and such interpretation is controlling as to the 1926, 1928 and all subsequent Acts.*

As pointed out in the brief for the Petitioner, on February 19, 1929, the Board of Tax Appeals decided this very question by unanimous decision in accord with our contention. On the announcement of that decision the Commissioner revoked his previous ruling and, as to the Acts of 1921, 1924, 1926 and 1928, directed that the net gain from bonds derived

as a result of their payment at, or redemption on call before, maturity should, at the option of the taxpayer other than a corporation, be taxed under the Capital Gains Section. Thus, from February, 1929, until December, 1932, when the *Watson* case was decided, or for almost four years, the ruling of the administrative department of the Government in charge of the collection of income taxes and, what seems to us of even more importance, the ruling of the Board especially established by Congress to determine questions arising under the Revenue Acts, interpreted these statutes in accordance with our contention. In the interim Congress had re-enacted the section using the identical phraseology adjudicated in the *Werner* case and found in the prior Acts.

There is no rule of statutory construction better established in this and other Courts than that such re-enactment by the legislative branch is an adoption of the interpretation theretofore placed upon the language by the administrative or quasi-judicial branches especially charged with its enforcement. See *United States* v. *Bassichis Co. et al*, 16 Customs Appeal 410, in which case the Court said:

> "In T. D. 19311 there was a definite, clear interpretation of the words 'all glass—not specially provided for,' which when unappealed from, became the definitely determined judicial status of the question, to be followed in the administration of the tariff act. After that decision was rendered and promulgated, Congress, on three successive occasions, used the identical language and it must be presumed that in using it the legislative body was fully cognizant of such judicial interpretation and the results that would ordinarily flow from it."

In the recent case of *Hassett* v. *Welch*, 303 U. S. 303, decided by this Court on February 28, 1938, the Collector of Internal Revenue sought to tax as part of a gross estate a certain amount of money irrevocably granted in trust, with

the reservation of life income to the trustor, before the Joint Resolution taxing such transfers was passed. This Court ruled against the Collector, holding that the Act was not intended to be retroactive. The Secretary of the Treasury on May 22, 1931, had issued a letter of directions that the relevant section be construed prospectively only. Congress had then re-enacted the substance of the Joint Resolution in the Act of 1932. In its opinion at page 312 this Court said:

> "Moreover, the re-enactment of the Resolution of 1931 in the light of the administrative rulings requires the conclusion that Congress approved and adopted the administrative constructions of the provision it re-enacted."

Nor is this principle limited to the construction of Acts re-enacting the prior statute in the same words and passed subsequent to the administrative rulings. It applies with like effect to the acts under which the rulings were promulgated.

Buttolph v. *Commissioner*, 29 Fed. 2nd 695, C. C. A. 7th Cir. 1928, was a case arising under the Income Tax Act of 1922. Administrative rulings had been promulgated under that Act and then in 1924 and in 1928 the section was re-enacted. The Court said (p. 696):

> "Such re-enactment of a statute, after practical construction—not plainly erroneous—and specific operation under it, may presumably be construed to embody such construction as a satisfactory interpretation of the legislative intent."

We would particularly call the Court's attention to the case of *Brewster* v. *Gage*, 280 U. S. 327. The petitioner, one of the residuary legatees of an estate, in the years 1920, 1921 and 1922 sold certain stocks distributed to him in 1920 and computed the profit or loss on each sale by comparison of its selling price with the value at the date of distribution. The applicable statutes,—that of 1918 as to 1920 income and that of 1921 as to 1921 and 1922 income,—provided that the basis

should be the fair market price or value "when acquired" (1918) or at the "time of acquisition" (1921). Literally interpreted, there could be no question that the residuary legatee "acquired" title at the date of distribution rather than on the date of the death of the testator, even though the legal title might relate back to the date of death. On the other hand, unquestionably real estate and specific bequests would vest at the time of death and there was no real reason why gains or losses to the estate or to specific devisees or legatees should be calculated on one basis and those to the residuary legatees on another. In its opinion deciding that date of death controlled under both Acts this Court stressed the regulations of the Commissioner under the 1918 Act and that the Act of 1921 was substantially identical with the 1918, and said (pages 336, 337):

> "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. * * * The substantial re-enactment in later acts of the provisions theretofore construed by the department is persuasive evidence of legislative approval of the regulation. * * * *The subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them.*" (Emphasis supplied.)

Applying this decision to the case at bar the re-enactment of the section in 1932 is an adoption of the *Werner* case, not only as to cases under the 1932 Act but as to all previous acts in which the Capital Gains Section is found.

The ruling of these cases is in entire accord with that set out by Chief Justice Marshall in *Alexander* v. *Alexandria*, 5 Cranch 1. When a number of statutes, whenever passed, relate to the same thing or general subject matter, they are to be construed together and are *in pari materia*.

Thus, whatever possible occasion for doubt there may have been prior to the enactment of the 1932 Act, the re-enactment of the section in that year, after the decision of the *Werner* case and the acquiescence of the Department, constituted a legislative approval of the rule therein set forth. When the Board on December 29, 1932, in *Watson* v. *Commissioner*, reversed its prior decision in the *Werner* case, it disregarded entirely the fact that earlier in the same year, in accordance with the principle above referred to, Congress had approved the ruling of the *Werner* case as a settled interpretation of the words used.

This conclusion is strengthened when we note that in May, 1934, in the Revenue Act next following the Board's overruling of *Werner* v. *Commissioner*, Congress added to the Capital Gains Section a decisive interpretation of the word "exchange" exactly in accord with the *Werner* decision.

It is difficult to find a clearer indication of the will of Congress. The original act is passed. The authorities especially established to administer it and to pass upon it judicially, the Commissioner and the Board, agree upon the interpretation for which we contend. Congress then re-enacts the section in identical words. The Board then erroneously reverses itself. But, at the very next opportunity, Congress adds a specific subsection to the Act giving to the words used the identical effect found in the *Werner* case, so that thereafter there will be no room for further argument.

B. ***The interpretation of the word "exchange", added to the Capital Gains Section in 1934, constitutes a legislative declaration of its meaning and governs the construction of the capital gains provision from its first enactment in 1921.***

In May, 1934, Congress added to the Capital Gains Section under controversy this subsection:

"(f) *Retirement of bonds, etc.* For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor. . . . . c. 277, Sec. 117, 48 Stat. 714.)" (26 U. S. C. A. Sec. 101, page 427.)

The Court will note the form of this amendment. Instead of amending subsection (c) of the 1928 Act in any way, Congress specifically provided that the amounts received in payment of bonds should be considered as amounts "received in exchange therefor". Congress was thus not changing the prior law but merely enacting a definition to be read into the law; such definition being necessitated by the decision in the *Watson* case which conflicted with the Congressional intent.

The brief for the Petitioner in the instant case fully covers this point and it would seem unnecessary for us to elaborate more fully thereon. We are unable to see any reason why the case at bar does not come squarely within the principle laid down by Chief Justice Marshall in *Alexander* v. *Alexandria*, 5 Cranch 1. The mere form of the amendment itself shows clearly that subsection (f) was not a declaration of a new policy but, as this Court said in *Jordan* v. *Roche*, 228 U. S. 436, "a more explicit expression of the purposes of the prior law made necessary by the judicial construction of that law", viz. the decision of the Board in the *Watson* case.

The case of *Felin* v. *Kyle*, 22 Fed. Supp. 556, cited and relied upon by the Government in the Circuit Court of Appeals for the First Circuit is illustrative of the erroneous interpretation which the Government places upon the 1934 legislation. In that case the District Court ruled that the 1934 amendment, passed after the decision of the *Watson*

case, showed clearly that Congress intended by the new provision to change the prior rule. Respectfully we submit that the decision of this Court in *Jordan* v. *Roche, supra,* is an apt illustration of the correct view and is diametrically opposed to the ruling in *Felin* v. *Kyle, supra,* and to the Government's contention here.

The facts in *Jordan* v. *Roche* show that in the years 1907 and 1908 the plaintiff imported from Porto Rico certain casks of bay rum. At that time the controlling Act was that of 1900 under which the Treasury had ruled such importation dutiable. In 1908 the Circuit Court of Appeals for the Second Circuit in *Anderson* v. *Newhall,* 161 Fed. 906, ruled adversely to the Government. For a few months thereafter the revenue officers followed the ruling of that case. On February 4, 1909, Congress passed an act specifically providing for taxation of bay rum in accordance with the prior interpretation by the Revenue Department and exactly contrary to the decision in *Anderson* v. *Newhall, supra.* The importer contended that the passage of the 1909 Act was a declaration that bay rum had not been subject to a tax under the prior statutes. Replying to that contention this Court said (228 U. S. at 445, 446):

> "* * * The history of the act rejects the contention and manifests that the act was passed in consequence of the decision in *Newhall* v. *Anderson,* and the other decisions to which we have referred. *The law was not the declaration of a new policy but a more explicit expression of the purpose of the prior law, made necessary by the judicial construction of that law.*" (Emphasis supplied.)

It would be difficult to find a more exact parallel to that in the case at bar than the situation in *Jordan* v. *Roche.* In that case the Revenue Act was being properly construed until the erroneous decision of *Newhall* v. *Anderson.* There-

upon Congress by the 1909 legislation enacted "a more explicit expression of the purpose of the prior law". In our situation the Capital Gains Section had been properly construed in the *Werner* case and was being properly administered until the erroneous decision of the *Watson* case. In the next Revenue Act, the hearings for which began almost immediately after that decision, Congress specifically adopted the ruling of the *Werner* case and repudiated that of the *Watson*.

It is interesting to note that in an elaborate opinion by Judge Stephens of the Circuit Court of Appeals for the Ninth Circuit in *Santa Monica Etc.* v. *U. S.*, 99 Fed. 2d 450 (October, 1938) the very Court whose action is here sought to be reviewed has emphatically approved the two rules of statutory construction upon which we rely.

On page 456 of the opinion we find the following language:

> "* * * * That such was a proper interpretation of section 234 (a) (5) is emphasized by the fact that Congress thrice re-enacted the section as found in the Revenue Act of 1921 in its identical language *after* the quoted Regulations had been promulgated. It is a settled rule of statutory interpretation that administrative construction of a statute must be deemed to have received legislative approval by re-enactment of the statutory provision without change. * * * * It must be recalled that Congress amended the section in 1932, 26 U. S. C. A. Sec. 23 (k), changing the language to read * * * * *. We do not think that Congress in so amending intended to change the law. The new statute was merely declaratory of the meaning of the previous law and was intended as a clarification thereof."

The Court will note that the decision in *Averill* v. *Commissioner* by the Circuit Court of Appeals for the First Circuit was announced after the decision by the Circuit Court of Appeals for the Ninth Circuit in the case at bar and that the

Court in the later case reviewed the opinion here sought to be reversed, including the very contention we are now discussing. After careful consideration it decided that under all the circumstances the doctrine of *Alexander* v. *Alexandria* is here relevant and decisive. We submit that its opinion is persuasive and will commend itself to this Court.

CONCLUSION.

Mr. Fairbanks and our clients made their returns in perfectly good faith and paid the full tax of 12½%, or an eighth of their gain, to the Government. At no time have they shown the slightest disposition to evade their fair contribution to the Federal revenue. We as their counsel are wholly unable to follow the basic theory behind the Government's attitude to our clients or that of the decision in the Ninth Circuit. While it is undoubtedly true that taxing statutes are to be construed against the taxpayer in order to prevent exemptions, it is equally true that such statutes are to be construed so that the burden of government will fall equitably and fairly upon its citizens. Neither Congress nor the Courts intend that there shall be a distinction between the tax to be paid by one taxpayer and that to be paid by another, unless there be some reason in fairness or in logic for such distinction. In no one of the briefs filed by the Government, in no one of the decisions sustaining its position, has there appeared even a suggestion that the result which the Government seeks in these cases is by any conception fair or just or that it rests other than on a strictly literal construction of the words of the statute.

No one can gainsay that the basic principle of statutory construction is the intention of Congress and we cannot believe that there is anything in this legislation, in its history or in its practical application, which demonstrates that the Congress of the United States ever intended the distinction for which the Government here contends.

To add to the taxable income of any taxpayer in a single year a profit accrued over a series of years results, as this Court said, in "excessive tax burdens". It is a reflection on the fairness of purpose of Congress to allege, as does the Government, that it is entirely willing to allow taxpayers to suffer under "excessive tax burdens" save only when relief therefrom will result in an increase in the public revenue. It is an unveiled assertion that the Congress of the United States stands indifferent when its citizens are unfairly taxed unless, as an incident to relieving them, the governmental revenue can be increased. We cannot believe that Congress entertains towards its constituents an attitude which would intentionally penalize those who happen to hold their capital investments until payment, and yet relieve those who chance to dispose of them before maturity.

As this Court said in *Helvering* v. *New York Trust Company, supra*, "It is to be inferred that Congress did not intend penalization of that sort." Nevertheless, the contention of the Government in these cases, in absolute disregard of one purpose of the statute authoritatively set forth in *Burnet* v. *Harmel*, attempts as to these taxpayers a result which cannot be otherwise characterized.

Respectfully submitted,

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